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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 68

NATHANIEL WRIGHT, CHARLES L. SMART, RASCO WHITE, JAMES W. THOMAS, BENJAMIN CARTER, JUDSON FORD,

Petitioners,

—v.—

STATE OF GEORGIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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—v.—

STATE OF GEORGIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered on November 9, 1961.

Citation to Opinion Below

The opinion of the Supreme Court of Georgia is reported in 122 S. E. 2d 737, and is set forth in the Appendix hereto, *infra* p. 1a, rehearing of which was denied, November 21, 1961.

Jurisdiction

The judgment of the Supreme Court of Georgia was entered on November 9, 1961 (R. 75); Appendix p. 9a, *infra*. Rehearing was denied November 21, 1961 (R. 80); Appendix p. 10a, *infra*. Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioners having asserted below and claiming here, denial of rights, privileges, and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Whether the conviction of the petitioners for unlawful assembly denied to them due process of law under the Fourteenth Amendment where they were convicted for being Negro and peacefully playing basketball in a municipally owned park customarily reserved for white persons, and the criminal statute under which they were convicted gave no notice that this constituted the crime of unlawful assembly.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Code of Georgia, Section 26-5301:

> "Unlawful Assemblies—Any two or more persons who shall assemble for the purpose of disturbing the public peace or committing any unlawful act, and shall not disperse on being commanded to do so by a judge, justice, sheriff, constable, coroner or other peace officer, shall be guilty of a misdemeanor."

Statement

Petitioners, six Negro young men, were arrested for "unlawful assembly"—assembling "for the purpose of disturbing the public peace or committing any unlawful act and . . . not dispers(ing) on being commanded . . ."—in the course of peacefully playing basketball in Daffin Park, Savannah, Georgia, a park in a "white" area (R. 56). "One reason [for the arrest] was because they were

Negroes" (R. 53). "It has been the custom to use the parks separately for the different races" (*Ibid.*). Colored children have played in Daffin Park, but not basketball (R. 53). There was no basketball court, as such, in any Negro park area until January 23, 1960 (R. 58). An arresting officer testified: "the defendants were playing basketball. They were not necessarily creating any disorder, they were just 'shooting at the goal', that's all they were doing, they wasn't disturbing anything" (R. 61).

The case first came to police "attention when this white lady had this conversation with us, the lady who told us that colored people were playing in the Basket Ball Court down there at Daffin Park, and that is the reason I went there, because some colored people were playing in the park. I did not ask this white lady how old these people were. As soon as I found out these were colored people I immediately went there" (R. 52). The officer " . . . arrested these people for playing basket ball in Daffin Park. One reason was because they were negroes" (R. 53). At the time "[t]hey were doing nothing besides playing basket ball, they were just normally playing basket ball . . ." (R. 53). "Under ordinary circumstances I [the officer] would not arrest boys for playing basketball in a public park" (R. 52).

Upon arrival the police first requested petitioners to leave. A petitioner asked who had ordered the police to the park (R. 51), to which an officer replied that they needed no orders (*Ibid.*). The purpose of the police in asking petitioners to leave was "to keep down trouble which looked to me [an officer] might start—there were five or six cars driving around the park at the time, white people" (R. 52) which was, however, " . . . not . . . unusual traffic for that time of day" (R. 53).

The Superintendent of the Recreational Department of Savannah testified that "we issue permits in all cases where we think there will be conflict, we try to regulate them" (R. 55), and that "if there was a conflict between the younger people and the older people using the park facilities the preference would be for the younger people to use them, but we have no objections to older people using the facilities if there are no younger people present or if they are not scheduled to be used by the younger people" (R. 55). But "there is no regulation for playing on a Court when it is not in use and there is no one around" (R. 57).

The evidence demonstrated no "conflict" (R. 55), and that there was "no one around" (R. 57). Grownups do use Daffin Park at certain times and under certain conditions. "[G]rownups could use [the basketball courts] if there was no other need for them" (R. 56). "[N]one of the children from the schools were there at that particular time" (R. 53).

Persons playing basketball would not have to wear any particular uniform if playing in an unregulated, unsupervised program; it would be consistent with Park Department policy to allow persons to wear ordinary clothing on the courts if they so chose (R. 56). Petitioners were well dressed in street clothing (R. 60).

While the Superintendent did not know whether the Department "had a planned program arranged for the day that these arrests were made, . . . normally they would not schedule anything for that time of the day because of the schools using the totals area there . . ." However, "if the schools were not there and were not using it and we had no program planned we certainly would not have been concerned about other people using it" (R. 58). In any event, the arrest and order to disperse were, in fact, not made because of some violation of the rules of the City Recreational Department because the arresting of-

ficer testified he didn't "know the rules of the City Recreational Department" (R. 52).

How the Federal Questions Were Raised and Decided Below

Prior to trial petitioners interposed a general demurrer in the City Court of Savannah raising four constitutional issues: Section 26-5301 of the Code of Georgia was so vague that they were not put on notice of what criminal act they had committed; that the statute did not sufficiently define disturbing the peace; and that as construed it was so vague as to place unlimited authority in the hands of police officers to arbitrarily designate acts to be held as criminal (R. 19-21) all in violation of the due process clause of the Fourteenth Amendment; and that the statute was applied to petitioners to enforce racial discrimination on governmentally owned facilities contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution. The trial judge overruled the demurrer on each and every ground (R. 21).

After the trial judge sentenced each of the petitioners, motion for new trial was filed (R. 26-27) in which the petitioners again objected that they were not fairly and effectively warned in Section 26-5301 Code of Georgia that their acts were prohibited, that the statute as construed was a delegation of arbitrary and capricious power to peace officers in violation of the due process clause of the Fourteenth Amendment.

The trial judge also overruled the motion for new trial on each and every ground (R. 29).

Petitioners on appeal to the Supreme Court of Georgia assigned as error in the bill of exceptions the overruling of the general demurrer and the motion for new trial (R. 1-8).

The Supreme Court of Georgia refused to consider the constitutional issues raised by objection to the overruling of the motion for new trial, because it deemed such objection abandoned:

> "In their bill of exceptions the defendants assign error on the judgment sentencing each defendant (fourth ground) and on the denial of their motion for a new trial (third ground). However, in their brief to this court they completely omitted the fourth ground and merely referred to the third ground by asking: 'Did the court commit error in overruling plaintiff's in error motion for new trial?' There was no argument, citation of authority, or statement that such grounds were still relied upon. Therefore, the applicable rule, as laid down in Henderson v. Lott, 163 Ga. 326(2) (136 SE 403), is: 'Assignments of error not insisted upon by counsel in their briefs or otherwise will be treated by this court as abandoned'" (R. 70).

The general demurrer also was held to be the improper means to raise two contentions that the statute had been applied to reinforce racial segregation of government facilities in violation of the equal protection clause of the Fourteenth Amendment (R. 71).

Under the demurrer the court below passed upon the only constitutional issue it held properly preserved, and ruled that the statute was not so vague as to deprive the petitioners of any constitutional rights under the Fourteenth Amendment:

> "The United States Supreme Court has held that a statute is not unconscionably vague where its provisions employ words with a well-settled common-law meaning" (R. 72).
>
> "Here the term 'disturbing the public peace' is of generic common-law origin" (R. 72).

> "The language of the Code section in question is pronounced in terms so lucid and unambiguous that a person of common intelligence would discern its meaning and apprehend with what violation he was charged" (R. 73).

Nor was there held to be any unconstitutional delegation of authority to a peace officer:

> "The last contention (5) assigned, that the Code section confers untrammelled and arbitrary authority upon the arresting officer, has no merit since we have determined that the statute has a clear-cut standard to apprise one of what constitutes a criminal act and thus to guide the conduct of such officer" (R. 74).

The judgment was affirmed.

Reasons for Granting the Writ

A. *Federal Questions Which the Court Below Unreasonably Refused to Decide Are Properly Reviewable by This Court.*

The question of whether the statute involved was so vague as not reasonably to apprise petitioners that their acts constituted an unlawful assembly in violation of the due process clause of the Fourteenth Amendment was properly before the Court below and, in affirming, the Supreme Court of Georgia disposed of petitioners' contentions adversely in a manner which presents them properly to this Court for review. Whether a Federal question was sufficiently and properly raised in the state court is itself a federal question, and this Court is not concluded by the view taken below. *First National Bank* v. *Anderson*, 269 U. S. 341. Federal rights are denied as well by a refusal of a state court to decide questions as erroneous decision of them. *Lawrence* v. *Mississippi*, 286 U. S. 276.

The question of vagueness presented by this petition was presented and pressed at successive stages of the litigation below, on demurrer, on motion for new trial, and motion for acquittal. While the State Supreme Court held that the issue as presented by demurrer was limited to the statute and accusations on their face, this, of course, cannot be alleged in connection with the motion for new trial which is designed to bring before the court the evidence at trial. *Sessions* v. *State*, 3 Ga. App. 13, 59 S. E. 196. The issue as raised by the motion for new trial, however, was held by the court below to have been waived because of the manner in which the point was briefed. Petitioners, however, have filed here certified copies of all briefs in the Supreme Court of Georgia which make it clear that the issue of vagueness as raised by the motion for new trial was in fact squarely presented to the Supreme Court of Georgia. See Brief of Plaintiffs in Error, p. 6 ("*Issues of Law* . . . (3) Did the Court Commit Error in Overruling Plaintiffs-in-Error Motion for New Trial?"). A common argument was submitted in support of the vagueness objection as it was raised in various stages of the case. (*Id.* at pp. 7-10). The brief was constructed in the form required by the Rules of the Georgia Supreme Court, Ga. Code Ann. 24-4515. While the brief commenced by stating "the principal question raised is whether or not the trial judge committed error in overruling the general demurrer," this was not claimed to be the only question raised. The attack on vagueness as raised under the motion for new trial was presented in the argument with clarity and specificity. The evidence was discussed in plaintiff-in-error's brief. The brief of defendant in error, a certified copy of which has also been filed here, is replete with discussion of the evidence and met plaintiff-in-error's arguments head on.

The essential purpose of the requirement that federal questions be raised in accordance with state procedure is to "enable the court as well as opposing counsel, readily to perceive what points are relied on", *Seaboard Air Line Ry.* v. *Watson*, 287 U. S. 86. The Georgia courts, both trial and appellate, and opposing counsel, were certainly apprised in due time with particularity of the petitioners' constitutional objections. It is only by a most restrictive and unreasonably strained construction that formal "judicial ignorance" can be made out. A construction of the state court as to the proper method of preserving federal questions will bind the Supreme Court "unless so unfair or unreasonable in its application to those asserting a Federal right as to obstruct it." *Central U. Telegraph Co. Edwardsville*, 269 U. S. 190, 195. As Mr. Justice Whittaker stated in *Staub* v. *Baxley*, 355 U. S. 313, 320, the finding of waiver of federal questions may not be based on wholly inadequate state grounds which would "force resort to an arid ritual of meaningless form." The decision below would make a greater fetish of the ritual of form than was demanded in *Staub*.

B. *Petitioners Were Denied Rights Guaranteed by the Fourteenth Amendment Because They Were Not Put on Notice by the Statute That the Acts They Participated in Were Criminal.*

This case involves the substantial question of whether a state may coerce conformity to a state pattern of segregation of the races on governmentally owned and operated recreational facilities by construing a broad and ambiguous criminal statute so as to make the use of these facilities by Negroes on the same basis as whites, a criminal act.

A statute, and any construction of it, must meet a minimum standard of prior warning of what is criminal conduct to avoid a charge of denial of due process of law

through vagueness. The applicable rule is stated in *Connally* v. *General Construction Company*, 269 U. S. 385, 391:

> "The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime and the element constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of a double meaning that the citizen may act upon one conception of its requirements and the Courts upon another."

Further, the standards of certainty in criminal cases must of necessity be higher than in those depending primarily upon civil sanctions for enforcement, *Winters* v. *New York*, 333 U. S. 507. In the instant case, petitioners could not possibly have anticipated that as Negroes, peacefully playing basketball in a municipally owned park is a criminal assembly to disturb the peace, as defined in the statute. The court below rejects the vagueness argument because the statute employs words with a well-settled common law meaning. However, in all of the cases cited to support this proposition the defendants' acts were at least reasonably within the long-established meaning of the statute. The only question in these cases was one of degree, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Nash* v. *U. S.*, 229 U. S. 373, 377. That Negroes would be charged with a criminal act for participating in the same activity deemed

lawful for whites on government property is not a question of degree, for it is not even colorably predictable by reading the statute under which petitioners were convicted.

A statute which does not lay down recognizable standards against which the discretion of those who administer it may be measured is unconstitutional and void. *Lovell* v. *Georgia*, 303 U. S. 444. As the Georgia Court has construed the statute, a police officer has unlimited power to designate any peaceful gathering as tending to disturb the peace. In this case he so chose to designate the act of Negroes playing basketball on a publicly owned court usually reserved for whites. Where *in fact* rankly unequal administration is sanctioned under the au[illegible] of a statute, such statute is vague on its face or a[illegible]d for lack of guide lines to prevent such arbitrary enforcement. *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496.

Petitioners had a right under the Fourteenth Amendment to utilize government facilities on the same basis as other citizens. They reasonably should have anticipated that the constitution would have been followed, rather than an unanticipated construction of Georgia law. Cf. *Mayor and City Council of Baltimore* v. *Dawson*, 350 U. S. 877. They could not have been deprived of access to any part of the municipal park even by a direct statute proscribing segregated areas. *Detiege* v. *New Orleans City Park Improvement Association*, 358 U. S. 54. This court has in many instances held that a statute is even more amenable to an attack of vagueness where its construction creates a danger of encroachment on constitutional rights and threatens to deter the exercise of these rights. *Saia* v. *New York*, 334 U. S. 558; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Kunz* v. *New York*, 340 U. S. 290.

As was said in *U. S.* v. *Clark Brewer*, 139 U. S. 278, "If the language of a statute is so general and indefinite

as to embrace not only acts properly and legally punishable but others *not punishable*, it will be voided for uncertainty." Here, the State of Georgia not only denies a constitutional right but attaches criminal sanctions to its exercise. This is accomplished through a novel construction of broad statute which in no wise gives prior warning that the recreational activities of Negroes in areas reserved for whites by the government are criminal acts.

C. *Petitioners' Convictions Denied Due Process of Law in That There Was No Evidence of the Essential Elements of the Crime Charged.*

The question presented below and brought to this Court, i.e., whether the statute under which petitioners were convicted is unconstitutionally vague in that it did not apprise them that being Negro and playing basketball in a white park constituted unlawful assembly is but another way of presenting the constitutional objection to this conviction under the doctrine of *Thompson* v. *City of Louisville*, 326 U. S. 199. In *Thompson* as in *Garner* v. *Louisiana*, 7 L. ed. 207 (1961), and any other case making the due process objection found in those cases, one convicted of crime without a shred of evidence that his activities were criminal under a statute always possesses a corollary constitutional objection that the statute did not and could not put him on notice that his conduct was criminal. Thus of necessity the judgments below complained of in this case are also constitutionally faulty for other reasons—discussed in *Thompson*—well established in the jurisprudence of our Constitution.

It is essential that this court grant certiorari to insure that its previous decisions prohibiting racially discriminatory action in violation of the due process and equal protection clauses of the Fourteenth Amendment will not be indirectly undermined or subverted.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF GEORGIA

Case No. 21430

WRIGHT *et al.*,

—v.—

THE STATE.

Decided November 9, 1961.

By the Court:

1. A mere recital in the brief of the defendants of the existence of an assignment of error, without argument or citation of authorities in its support, and without a statement that it is insisted upon by counsel, is insufficient to save it from being treated as abandoned.

2. It is not error in a criminal case for the trial judge to refuse to direct a verdict of acquittal.

3. A demurrer which seeks to add facts not apparent on the face of the accusation must fail as a speaking demurrer.

4. A Code section utilizing terms with an established common-law meaning, and which is itself of common-law origin, is sufficiently definite to apprise a person of common intelligence with a standard which he may use in determining its command; this more than satisfies the requirements of due process.

5. An officer is not vested with arbitrary authority when he only makes an arrest, and it is left to judicial processes to ascertain if the described components of a criminal act are present.

Submitted October 9, 1961—Decided November 9, 1961—Rehearing denied November 21, 1961.

Unlawful assembly; constitutional question. Savannah City Court. Before Judge Alexander.

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The defendants, Nathaniel Wright, Charles L. Smart, Rosco (e?) White, James W. Thomas, Benjamin Carter, and Judson Ford, were brought to trial in the City Court of Savannah for violation of Code § 26-5301 which reads: "Unlawful assemblies.—Any two or more persons who shall assemble for the purpose of disturbing the public peace or committing any unlawful act, and shall not disperse on being commanded to do so by a judge, justice, sheriff, constable, coroner, or other peace officer, shall be guilty of a misdemeanor." The gravamen of the offense, as detailed in the accusation, was: "In that the said defendants did assemble at Daffin Park for the purpose of disturbing the public peace and refused to disburse (sic) on being commanded to do so by sheriff, constable, and peace officer, to wit: W. H. Thompson and G. W. Hillis."

Before their arraignment and before pleading to the accusation, the defendants filed a general demurrer to the accusation, contending that for five enumerated reasons the Code section above cited is unconstitutional. The trial judge overruled the general demurrer, and evidence was then introduced by the State at the conclusion of which counsel for the defendants made a motion to acquit. After the argument of counsel, in the absence of the jury, the

trial judge denied the motion to acquit. The jury was recalled and, after argument of counsel and the charge of the court, returned a verdict of guilty. Whereupon the trial judge sentenced each defendant to pay a fine of $100 or to serve five months imprisonment, with the exception of the defendant Wright, who was sentenced to pay a fine of $125 or to serve six months imprisonment.

The defendants filed a motion for new trial which was subsequently overruled on each and every ground. The

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trial judge then issued an order permitting the defendants' cases to be consolidated since all the cases were predicated upon identical circumstances and facts, and involved the same defensive pleas and the same questions of law.

The defendants excepted and assign error on the overruling of their general demurrer, the refusal by the trial judge to direct a verdict of acquittal, the denial of their motion for a new trial, and on the judgment sentencing the defendants. Each of these assignments of error will be considered in order inverse from that in which it is above presented.

E. H. Gadsden, B. Clarence Mayfield, for plaintiffs in error.

Andrew J. Ryan, Solicitor-General, Sylvan A. Garfunkel, contra.

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QUILLIAN, *Justice*: 1. In their bill of exceptions the defendants assign error on the judgment sentencing each defendant (fourth ground) and on the denial of their motion for a new trial (third ground). However, in their brief to this court they completely omitted the fourth ground and merely referred to the third ground by asking: "Did the court commit error in overruling plaintiff's in error

motion for new trial?" There was no argument, citation of authority, or statement that such grounds were still relied upon. Therefore, the applicable rule, as laid down in Henderson v. Lott, 163 Ga. 326 (2) (136 SE 403), is: "Assignments of error not insisted upon by counsel in their briefs or otherwise will be treated by this court as abandoned. A mere recital in briefs of the existence of an assignment of error, without argument or citation of authorities in its support, and without a statement that it is insisted upon by counsel, is insufficient to save it from being treated as abandoned." Almand v. Pate, 143 Ga. 711 (1) (85 SE 909); Head v. Lee, 203 Ga. 191, 202 (45 SE 2d 666); The B-X Corp. v. Jeter, 210 Ga. 250 (4) (78 SE 2d 790).

2. The second ground upon which the defendants rely is that the trial judge erred in failing to direct a verdict of acquittal for the defendants at the conclusion of the State's evidence. It is not error in a criminal case to refuse to direct a verdict of not guilty. Winford v. State, 213 Ga. 396, 397 (99 SE 2d 120); Williams v. State, 206 Ga. 107 (10) (55 SE 2d 589); Coleman v. State, 211 Ga. 704 (2) (88 SE 2d 381); Baugh v. State, 211 Ga. 863 (1) (89 SE 2d 504).

3. The first ground in the bill of exceptions is that the trial judge erred in overruling their general demurrers to the accusation. The defendants urge five contentions as to why Code § 26-5301, per se and as applied, violates rights

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secured to them by the Constitutions of the United States and of Georgia. Contentions (3) and (4) attack the Code section in question as unconstitutional as applied, since it was used to enforce racial discrimination, and as uncon-

stitutional in that the arrest was pursuant to the policy, custom, and usage of the State of Georgia, which compels segregation of the races.

Neither of these two contentions can be ascertained from an examination of the accusation. A demurrer may properly attack only those defects which appear on the face of the petition, indictment, or, in this case, accusation. A demurrer which seeks to add facts not so apparent or to supply extrinsic matters must fail as a speaking demurrer. Jackson v. State, 64 Ga. 344; Arthur v. State, 146 Ga. 827 (92 SE 637). See also Walters v. State, 90 Ga. App. 360, 365 (83 SE 2d 48).

4. Contentions (1) and (2) attack the Code section, on its face, as violative of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and by the Georgia Constitution, arguing that said Code section is so vague that the defendants are not placed on notice as to what criminal act they have allegedly committed, rendering it impossible to answer the charge or to make legal defense, and unconscionably vague in that nowhere in the statute does there appear a definition of disturbing the public peace or committing any unlawful act.

Since the defendants were charged only with "disturbing the public peace," the alleged vagueness of "committing any unlawful act" need not be considered. Chaplinsky v. New Hampshire, 315 U. S. 568, 572 (62 S. Ct. 766, 86 LE 1031); Whittle v. Jones, 198 Ga. 538, 544 (32 SE 2d 94); Kryder v. State, 212 Ga. 272, 274 (91 SE 2d 612).

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Neither does the defendants' purported attack on the Code section under the Georgia Constitution raise any meritorious issue. In order to raise a question as to the constitu-

tionality of a statute, the provision of the Constitution alleged to have been violated must be clearly specified and designated, reference being made to the part, paragraph, or section. Clements v. Powell, 155 Ga. 278, 280 (8) (166 SE 624); Inlaw v. State, 168 Ga. 377 (1) (147 SE 881); Johns v. State, 180 Ga. 187, 188 (3) (178 SE 707); Manufacturers Trust Co. v. Wilby-Kincey Service Corp., 204 Ga. 273, 274 (49 SE 2d 514); Krasner v. Rutledge, 204 Ga. 380, 382 (49 SE 2d 864).

The United States Supreme Court has held that a statute is not unconscionably vague where its provisons employ words with a well-settled common-law meaning (Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 108-111, 29 S. Ct. 220, 53 LE 417); Nash v. United States, 229 U. S. 373, 376-378, 33 S. Ct. 780, 57 LE 1232; Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502, 45 S. Ct. 141, 69 LE 402), approved in Connally v. General Const. Co., 269 U. S. 385, 391 (46 S. Ct. 126, 70 LE 322); or is not couched in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Whitney v. California, 274 U. S. 357, 368 (47 S. Ct. 641, 71 LE 1095); Fox v. Washington, 236 U. S. 273, 276-278 (35 S. Ct. 383, 59 LE 573); Miller v. Strahl, 239 U. S. 426, 434 (36 S. Ct. 147, 60 LE 364); Omaechevarria v. Idaho, 246 U. S. 343, 348 (38 S. Ct. 323, 62 LE 763); United States v. Alford, 274 U. S. 264, 267 (47 S. Ct. 591, 71 LE 1040).

Here the term "disturbing the public peace" is of generic common-law origin. Faulkner v. State, 166 Ga. 645, 665 (144 SE 193); 11 C. J. S. 817, § 1. "Disturbing the peace" or its synonym "breach of peace," has long been inherently encompassed in our law and is prevalent in the v[illegible]us

jurisdictions. 11 C. J. S. 817 et seq., § 2 et seq.; 8 Am. Jur. 834 et seq., § 3 et seq.

Further, the crime of unlawful assembly is itself of common-law origin, Reg. v. Pugh (1704), 87 Eng. Reprint 900, Rex v. Birt (1831), 172 Eng. Reprint 919, 91 C. J. S. 495, § 1; 46 Am. Jur. 126, § 2; is described in slightly varying forms in the vast majority of jurisdictions (Annot., 71 ALR 2d 875); and in our own State was codified in the Penal Code of 1816 (Ga. L. 1816, p. 178; Lamar's Comp. p. 592).

"The uncertainty in a statute which will amount to a denial of due process of law is not the difficulty of ascertaining whether close cases fall within or without the prohibition of the statute, but whether the standard established by the statute is so uncertain that it cannot be determined with reasonable definiteness that any particular act is disapproved; and a criminal statute is sufficiently definite if its terms furnish a test based on knowable criteria which men of common intelligence who come in contact with the statute may use with reasonable safety in determining its command." 163 A. L. R. 1108, Annotating Minnesota v. Lanesboro Produce Co., 221 Minn. 246 (21 NW 2d 792) (citing Nash v. United States, supra, United States v. Wurzbach, 280 U. S. 396, 50 S. Ct. 167, 74 LE 508, and Collins v. Com. of Kentucky, 234 U. S. 634, 34 S. Ct. 924, 58 LE 1510). The language of the Code section in question is pronounced in terms so lucid and unambiguous that a person of common intelligence would discern its meaning and apprehend with what violation he was charged. Farrar v. State, 187 Ga. 401 (200 SE 803); Fowler v. State, 189 Ga. 733 (8 SE 2d 77); Watson v. State, 192 Ga. 679 (16 SE 2d 426).

5. The last contention (5) assigned, that the Code sec-
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tion confers untrammelled and arbitrary authority upon the arresting officer, has no merit since we have determined that the statute has a clear-cut standard to apprise one of what constitutes a criminal act and thus to guide the conduct of such officer. There is no usurpation of judicial authority, nor the improper delegation of judicial discretion, since the officer involved only makes the arrest when, in his discretion, he believes a crime to have been perpetrated. The innocence or guilt, beyond a reasonable doubt, of the accused must still be determined by judicial process.

This is a case of first impression in this State, and our research has failed to reveal any full-bench decisions from other jurisdictions on the exact question of the constitutionality of a similar unlawful-assembly statute. Nevertheless, see Code v. Arkansas, 338 U. S. 345 (70 S. Ct. 172, 94 LE 155). However, by applying the well-recognized principles and applicable tests above stated, we find no deprivation of the defendants' constitutional rights under the Fourteenth Amendment of the United States Constitution.

Judgment affirmed. All the Justices concur.

SUPREME COURT OF GEORGIA

21430

ATLANTA, November 9, 1961

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

NATHANIEL WRIGHT *et al.*,

—v.—

THE STATE.

This case came before this court upon a writ of error from the City Court of Savannah; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

All the Justices concur.

SUPREME COURT OF GEORGIA

21430

ATLANTA, November 21, 1961

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

NATHANIEL WRIGHT *et al.*,

—v.—

THE STATE.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.